

STATE OF OKLAHOMA

2nd Session of the 49th Legislature (2004)

HOUSE BILL HB2474:

Braddock

AS INTRODUCED

An Act relating to revenue and taxation; enacting the Master Settlement Agreement Complementary Act; stating legislative declarations; defining terms; requiring tobacco product manufacturers to execute a certification; specifying contents of certification; providing procedures regarding the certifications; requiring the Attorney General to develop a directory; specifying contents of the directory; making certain actions unlawful; requiring certain entities to appoint an agent for service of process; providing for the Secretary of State to be appointed as agent under certain circumstances; requiring stamping agents to submit certain information to the Oklahoma Tax Commission; providing for the sharing of certain information; allowing the Attorney General to gain access to certain information; authorizing the Oklahoma Tax Commission to suspend or revoke the license of a stamping agent and impose civil penalties for certain violations; declaring certain cigarettes as contraband; providing for the seizure of certain property and providing procedures related thereto; making certain actions unlawful; exempting certain proceedings from the Administrative Procedures Act; adding requirement for a stamping agent's license; providing for implementation of the act; authorizing promulgation of rules; providing for the recovery of certain costs and fees; providing for the disgorgement of profits from violations of act; repealing Section 1, Chapter 333, O.S.L. 2002 (68 O.S. Supp. 2003, Section 360), which relates to tobacco product manufacturers; providing for codification; and declaring an emergency.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

SECTION 1. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 360.1 of Title 68, unless there is created a duplication in numbering, reads as follows:

Sections 1 through 8 of this act shall be known and may be cited as the "Master Settlement Agreement Complementary Act".

SECTION 2. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 360.2 of Title 68, unless there is created a duplication in numbering, reads as follows:

The Oklahoma Legislature declares that violations of Sections 600.1 through 600.23 of Title 37 of the Oklahoma Statutes threaten the integrity of the Master Settlement Agreement as defined in Section 600.22 of Title 37 of the Oklahoma Statutes, the fiscal soundness of the state, and the public health. The Legislature declares that enacting this act enhances the Prevention of Youth Access to Tobacco Act by preventing violations and aiding in the enforcement of the Master Settlement Agreement Complementary Act and thereby safeguard the Master Settlement Agreement, the fiscal soundness of the state, and the public health.

SECTION 3. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 360.3 of Title 68, unless there is created a duplication in numbering, reads as follows:

As used in the Master Settlement Agreement Complementary Act:

1. "Brand family" means all styles of cigarettes sold under the same trademark and differentiated from one another by means of additional modifiers or descriptors, including, but not limited to, "menthol", "lights", "kings", and "100s", and includes any brand name alone or in conjunction with any other word, trademark, logo, symbol, motto, selling message, recognizable pattern of colors, or any other indicia of product identification identical or similar to, or identifiable with, a previously known brand of cigarettes;

2. "Cigarette" has the same meaning as that term is defined in Section 600.22 of Title 37 of the Oklahoma Statutes;

3. "Tax Commission" is means the Oklahoma Tax Commission;

4. "Master Settlement Agreement" has the same meaning as in Section 600.22 of Title 37 of the Oklahoma Statutes;

5. "Nonparticipating manufacturer" means any tobacco product manufacturer as defined in Section 600.22 of Title 37 of the Oklahoma Statutes that is not a participating manufacturer;

6. "Participating manufacturer" has the meaning given that term in Section II(jj) of the Master Settlement Agreement as defined in Section 600.22 of Title 37 of the Oklahoma Statutes and all amendments to the Master Settlement Agreement;

7. "Qualified escrow fund" has the same meaning as that term is defined in Section 600.22 of Title 37 of the Oklahoma Statutes;

8. "Stamping agent" means any entity that is authorized under subsection A of Section 304 of Title 68 of the Oklahoma Statutes to affix any tax stamps issued by the Oklahoma Tax Commission to packages of cigarettes, or any entity authorized pursuant to Section 415 of Title 68 of the Oklahoma Statutes to pay to the Oklahoma Tax Commission any tobacco products tax; and

9. "Units sold" has the same meaning as that term is defined in Section 600.22 of Title 37 of the Oklahoma Statutes.

SECTION 4. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 360.4 of Title 68, unless there is created a duplication in numbering, reads as follows:

A. 1. Every tobacco product manufacturer whose cigarettes are sold in this state, whether directly or through a distributor, retailer or similar intermediary or intermediaries, shall execute and deliver on a form or in the manner prescribed by the Attorney General a certification to the Oklahoma Tax Commission and Attorney General, no later than the April 30 of each year, certifying under penalty of perjury that, as of the date of certification, the tobacco product manufacturer either:

- a. is a participating manufacturer, or
- b. is in full compliance with the provisions of Sections 600.21 through 600.23 of Title 37 of the Oklahoma Statutes.

2. A participating manufacturer shall include in its certification a list of its brand families. The participating manufacturer shall update the list thirty (30) calendar days prior to any addition to or modification of its brand families by executing and delivering a supplemental certification to the Attorney General and the Oklahoma Tax Commission.

3. A nonparticipating manufacturer shall include in its certification:

- a. a list of all of its brand families and the number of units sold for each brand family that were sold in the state during the preceding calendar year, and
- b. a list of all of its brand families that have been sold in the state at any time during the current calendar year:
  - (1) indicating, by an asterisk, any brand family sold in the state during the preceding calendar year that is no longer being sold in the state as of the date of the certification, and
  - (2) identifying by name and address any other manufacturer of the brand families in the preceding or current calendar year.

The nonparticipating manufacturer shall update the list thirty (30) calendar days prior to any corrected final addition to or modification of its brand families by executing and delivering a supplemental certification to the Attorney General and the Oklahoma Tax Commission.

4. In the case of a nonparticipating manufacturer, the certification shall further certify that the nonparticipating manufacturer:

- a. is registered to do business in the state or has appointed a resident agent for service of process and

provided notice thereof as required by Section 5 of this act,

- b. has established and continues to maintain a Qualified Escrow Fund, and
- c. has executed a qualified escrow agreement that has been reviewed and approved by the Attorney General and that governs the qualified escrow fund as defined in Section 600.22 of Title 37 of the Oklahoma Statutes that the nonparticipating manufacturer is in full compliance with the provisions of Sections 600.21 through 600.23 of Title 37 of the Oklahoma Statutes and the Master Settlement Agreement Complementary Act and any rules promulgated pursuant to the Master Settlement Agreement Complementary Act.

5. The nonparticipating manufacturer shall include with certification:

- a. the name, address, and telephone number of the financial institution with which the nonparticipating manufacturer has established its qualified escrow fund,
- b. the account number of its qualified escrow fund and any subaccount number for the State of Oklahoma,
- c. the amount the nonparticipating manufacturer placed in the qualified escrow fund for cigarettes sold in Oklahoma during the preceding calendar year, the date and amount of each deposit to the fund, and any evidence or verification as may be deemed necessary by the Attorney General to confirm the information required by this paragraph, and
- d. the amount and date of any withdrawal or transfer of funds the nonparticipating manufacturer made at any time from the qualified escrow fund or from any other

qualified escrow fund into which the nonparticipating manufacturer made escrow payments pursuant to Section 600.23 of Title 37 of the Oklahoma Statutes rules promulgated thereto.

6. A tobacco product manufacturer may not include a brand family in its certification unless:

- a. in the case of a participating manufacturer, the participating manufacturer affirms that the brand family is to be deemed to be its cigarettes for purposes of calculating its payments under the Master Settlement Agreement for the relevant year, in the volume and shares determined pursuant to the Master Settlement Agreement, or
- b. in the case of a nonparticipating manufacturer, the nonparticipating manufacturer affirms that the brand family is to be deemed to be its cigarettes for purposes of the provisions of Sections 600.21 through 600.23 of Title 37 of the Oklahoma Statutes.

7. Nothing in this section shall be construed as limiting or otherwise affecting the right of this state to maintain that a brand family constitutes cigarettes of a different tobacco product manufacturer for purposes of calculating payments under the Master Settlement Agreement or for purposes of Sections 600.21 through 600.23 of Title 37 of the Oklahoma Statutes.

8. Tobacco product manufacturers shall maintain all invoices and documentation of sales and other information relied upon for the certification for a period of five (5) years, unless otherwise required by law to maintain them for a greater period of time.

B. 1. Not later than ninety (90) calendar days after this act takes effect, the Attorney General shall develop and publish on its website a directory listing all tobacco product manufacturers that have provided current and accurate certifications conforming to the

requirements of subparagraph a of paragraph 4 of subsection A of this section and all brand families that are listed in the certifications, except as otherwise provided in this section.

2. The Attorney General shall not include or retain in the directory the name or brand families of any nonparticipating manufacturer that has failed to provide the required certification or whose certification the Attorney General determines is not in compliance with paragraphs 3, 4, and 5 of subsection A of this section, unless the Attorney General has determined that a violation has been cured to the satisfaction of the Attorney General.

3. Neither a tobacco product manufacturer nor brand family shall be included or retained in the directory if the Attorney General concludes, in the case of a nonparticipating manufacturer, that:

- a. any escrow payment required pursuant to Section 600.23 of Title 37 of the Oklahoma Statutes for any period for any brand family, whether or not listed by the nonparticipating manufacturer, has not been fully paid into a qualified escrow fund governed by a qualified escrow agreement that has been approved by the Attorney General, or
- b. any outstanding final judgment, including interest thereon, for a violation of the provisions of Sections 600.21 through 600.23 of Title 37 of the Oklahoma Statutes has not been fully satisfied for the brand family or manufacturer.

4. The Attorney General shall update the directory as necessary in order to correct mistakes and to add or remove a tobacco product manufacturer or brand family to keep the directory in conformity with the requirements of the Master Settlement Agreement Complementary Act.

5. Every stamping agent shall provide and update, as necessary, an electronic mail address to the Oklahoma Tax Commission and the Attorney General for the purpose of receiving any notifications as may be required by the Master Settlement Agreement Complementary Act.

C. It shall be unlawful for any person to:

1. Affix a stamp to a package or other container of cigarettes of a tobacco product manufacturer or brand family not included in the directory; and

2. Sell, offer, or possess for sale, in this state, or import for personal consumption in this state, cigarettes of a tobacco product manufacturer or brand family not included in the directory.

SECTION 5. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 360.5 of Title 68, unless there is created a duplication in numbering, reads as follows:

A. Any nonresident or foreign nonparticipating manufacturer that has not registered to do business in this state as a foreign corporation or business entity shall appoint and continually engage without interruption, as a condition precedent to having its brand families included or retained in the directory, the services of an agent in this state to act as agent for the service of process on whom all process, and any action or proceeding against it concerning or arising out of the enforcement of the Master Settlement Agreement Complementary Act and Sections 600.21 through 600.23 of Title 37 of the Oklahoma Statutes, may be served in any manner authorized by law. The service shall constitute legal and valid service of process on the nonparticipating manufacturer. The nonparticipating manufacturer shall provide the name, address, phone number, and proof of the appointment and availability of the agent to perform the duties of an agent pursuant to the Master Settlement Agreement Complementary Act and to the satisfaction of the Oklahoma Tax Commission and the Attorney General.

B. The nonparticipating manufacturer shall provide notice to the Oklahoma Tax Commission and Attorney General thirty (30) calendar days prior to termination of the authority of an agent and shall further provide proof to the satisfaction of the Attorney General of the appointment of a new agent no less than five (5) calendar days prior to the termination of an existing agent appointment. If an agent terminates an agency appointment, the nonparticipating manufacturer shall notify the Oklahoma Tax Commission and Attorney General of the termination within five (5) calendar days and shall include proof to the satisfaction of the Attorney General of the appointment of a new agent.

C. Any nonparticipating manufacturer whose cigarettes are sold in this state, who has not appointed and engaged an agent as required by this section, shall be deemed to have appointed the Secretary of State as its agent and may be proceeded against in courts of this state by service of process upon the Secretary of State. However, the appointment of the Secretary of State as the agent shall not satisfy the condition precedent for having the brand families of the nonparticipating manufacturer included or retained in the directory.

SECTION 6. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 360.6 of Title 68, unless there is created a duplication in numbering, reads as follows:

A. Not later than twenty (20) calendar days after the end of each calendar month, and more frequently if so directed by the Oklahoma Tax Commission, each stamping agent shall submit any information the Oklahoma Tax Commission requires to facilitate compliance with the Master Settlement Agreement Complementary Act, including, but not limited to, a list by brand families of the total number of cigarettes, or in the case of roll-your-own tobacco, the equivalent stick count, for which the stamping agent affixed stamps during the previous calendar month or otherwise paid the tax due for

such cigarettes. The stamping agent shall maintain, and make available to the Oklahoma Tax Commission and the Attorney General, all invoices and documentation of sales of all nonparticipating manufacturer cigarettes and any other information relied upon in reporting to the Oklahoma Tax Commission for a period of five (5) years.

B. The Oklahoma Tax Commission may disclose to the Attorney General any information received under the Master Settlement Agreement Complementary Act and requested by the Attorney General for purposes of determining compliance with and enforcing the provisions of the act. The Oklahoma Tax Commission and Attorney General shall share with each other the information received under the Master Settlement Agreement Complementary Act and may share the information with other federal, state, or local agencies only for purposes of enforcement or litigation of the act, the provisions of Sections 600.21 through 600.23 of Title 37 of the Oklahoma Statutes, corresponding laws of other states, and the Master Settlement Agreement.

C. The Attorney General may require at any time from a nonparticipating manufacturer proof, from the financial institution in which the nonparticipating manufacturer has established a qualified escrow fund for the purpose of compliance with the provisions of Sections 600.21 through 600.23 of Title 37 of the Oklahoma Statutes, of the amount of money in the fund, exclusive of interest, the amount and date of each deposit to the fund, and the amount and date of each withdrawal from the fund.

D. In addition to the information required to be submitted pursuant to the Oklahoma Tax Commission, the Attorney General may require a stamping agent or tobacco product manufacturer to submit any additional information including, but not limited to, samples of the packaging or labeling of each brand family, and proof of compliance with laws and regulations regarding the manufacture,

labeling, importation, and exportation of cigarettes, as is necessary to enable the Attorney General to determine whether a tobacco product manufacturer is in compliance with the Master Settlement Agreement Complementary Act. The Oklahoma Tax Commission and the Attorney General may require production of information sufficient to enable the Attorney General to determine the adequacy of the amount of the installment deposit.

E. To promote compliance with the Master Settlement Agreement Complementary Act, the Oklahoma Tax Commission, at the request of the Attorney General, may promulgate rules requiring a tobacco product manufacturer subject to the requirements of paragraph 2 of subsection A of Section 600.23 of Title 37 of the Oklahoma Statutes to make the escrow deposits required in quarterly installments during the year in which the sales covered by the deposits are made.

SECTION 7. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 360.7 of Title 68, unless there is created a duplication in numbering, reads as follows:

A. In addition to or in lieu of any other civil or criminal remedy provided by law, upon a determination that a stamping agent has violated Section 6 of this act or any rule promulgated pursuant to the Master Settlement Agreement Complementary Act, the Oklahoma Tax Commission may revoke or suspend the license of the stamping agent. Each stamp affixed and each sale or offer to sell cigarettes in violation of the Master Settlement Agreement Complementary Act shall constitute a separate violation. For each violation, the Oklahoma Tax Commission may also impose a civil penalty in an amount not to exceed the greater of five hundred percent (500%) of the retail value of the cigarettes or Five Thousand Dollars (\$5,000.00) upon a determination of violation of the Master Settlement Agreement Complementary Act or any rules promulgated pursuant thereto.

B. Any cigarettes that have been sold, offered for sale, or possessed for sale in this state or imported for personal

consumption in this state, in violation of the Master Settlement Agreement Complementary Act, shall be deemed contraband pursuant to the Master Settlement Agreement Complementary Act. Those cigarettes shall be subject to seizure and forfeiture as provided by this section and all cigarettes so seized and forfeited shall be destroyed as provided by this section and not resold.

C. 1. Cigarettes or tobacco product distributors and wholesalers licensed by the Oklahoma Tax Commission, pursuant to Section 304 or 415 of Title 68 of the Oklahoma Statutes, who also distribute cigarettes in a state bordering Oklahoma may store in their Oklahoma warehouse cigarettes made contraband under this section if, and only if, they have the tax stamp of another state affixed to each package of cigarettes.

2. Cigarettes or roll-your-own tobacco products made contraband pursuant to this section, without being subject to seizure or forfeiture, may be transported in, into, or through the state either:

- a. on a commercial carrier with a proper bill of lading with an out-of-state destination,
- b. when the tax stamp of another state is affixed to each pack of cigarettes or tobacco product transported, or
- c. on a commercial carrier with a proper bill of lading to a tobacco product distributor or wholesaler licensed by the Oklahoma Tax Commission, pursuant to Section 304 or 415 of Title 68 of the Oklahoma Statutes, who also distributes cigarettes in a state bordering Oklahoma if, and only if, the packing slip accompanying the shipment indicates the shipment is for sale in another state and indicates which state, and the invoice for the shipment also indicates the shipment is for sale in a state other than Oklahoma and identifies the state in which the shipment is to

be sold. The time of delivery of the shipments shall be indicated on the bill of lading of the common carrier when delivery is completed. The receiving Oklahoma distributor or wholesaler must, within twenty-four (24) hours of receiving the delivery, affix or cause to be affixed to each package of cigarettes the stamp of the state in which they are to be sold.

3. All cigarettes, tobacco products, vehicles, and property so seized shall be listed and appraised by the officer making the seizure and turned over to the county sheriff of the county in which the seizure is made and a receipt therefor taken. The person making the seizure shall immediately make a written report of the seizure, showing the name of the person making the seizure, the location of the seizure, the person from whom the property was seized, and an inventory and appraisal of the property at the usual and ordinary retail price of the articles received. The report shall be filed with the Oklahoma Tax Commission and the Attorney General. The district attorney of the county in which the seizures are made, at the request of the Oklahoma Tax Commission or Attorney General, shall file in the district court forfeiture proceedings in the name of the State of Oklahoma, as plaintiff, and in the name of the owner or person in possession, as defendant, if known, and if unknown or not susceptible to the jurisdiction of the court, in the name of the property seized. The clerk of the court shall issue a summons to the owner or person in whose possession the property was found directing the owner or person to answer within ten (10) days. At the forfeiture proceeding, if a distributor or wholesaler demonstrates through clear and convincing evidence that the possession of contraband by the distributor or wholesaler was accidental, the vehicle in which the contraband was being transported shall not be forfeited. In no case, however, shall

possession of more than twenty (20) cartons of contraband product be considered by the courts as being possessed accidentally. If the property is declared forfeited and ordered sold, notice of the sale shall be posted not less than ten (10) days before the date of sale in five public places in the county in which the seizures are made. However, any cigarettes or tobacco products forfeited pursuant to this section shall be destroyed by the county sheriff. Proceeds of the sale shall be deposited with the clerk of the court, who shall, after deducting costs including the costs of prosecution, storage, and sale, pay the balance to the Oklahoma Tax Commission for deposit in the Tobacco Settlement Endowment Trust Fund.

D. The Attorney General may seek an injunction to restrain a threatened or actual violation of the Master Settlement Agreement Complementary Act by a stamping agent and to compel the stamping agent to comply with those provisions. In any action brought pursuant to this section, the state shall be entitled to recover the costs of investigation, costs of the action, and reasonable attorney fees.

E. 1. It shall be unlawful for a person to:

- a. sell or distribute cigarettes, or
- b. acquire, hold, own, possess, transport, import, or cause to be imported cigarettes that the person knows or should know are intended for distribution or sale in the state in violation of the Master Settlement Agreement Complementary Act. A violation of the act shall be a misdemeanor.

2. A person who violates subsection C of Section 4 of this act engages in an unfair and deceptive trade practice in violation of the provisions of the Oklahoma Consumer Protection Act.

SECTION 8. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 360.8 of Title 68, unless there is created a duplication in numbering, reads as follows:

A. The Attorney General need not place on the directory the products of a tobacco product manufacturer that has not provided all the information required in the certification.

B. The consideration of a certification of a tobacco product manufacturer to have its brand added to the directory by the Attorney General shall not be considered an individual proceeding under the Administrative Procedures Act, nor shall the procedural requirements for an individual proceeding apply to that consideration.

C. No person shall be issued a license or granted a renewal of a license to act as a stamping agent unless the person has certified in writing, under penalty of perjury, that the person will comply fully with this section.

D. For calendar year 2004, if the effective date of this act is later than March 16, 2004, the first report of stamping agents required by subsection A of Section 6 of this act shall be due thirty (30) calendar days after the effective date of this act. The certifications by a tobacco product manufacturer described in subsection A of Section 4 of this act shall be due forty-five (45) calendar days after the effective date of this act. The directory described in subsection B of Section 4 of this act shall be published or made available within ninety (90) calendar days after the effective date of this act. Until the directory is published on the website of the Attorney General, all cigarette brands of tobacco product manufacturers which are on a list of the names and brand names of tobacco product manufacturers that have failed to comply with the provisions of Sections 600.21 through 600.23 of the Title 37 of the Oklahoma Statutes and published on the website of the Oklahoma Tax Commission as provided for in Section 360 of Title 68 of the Oklahoma Statutes, shall remain contraband and be subject to seizure and forfeiture as provided for in that section.

E. The Oklahoma Tax Commission may promulgate rules necessary to implement the provisions of the Master Settlement Agreement Complementary Act.

F. In any action brought by the state to enforce the Master Settlement Agreement Complementary Act, the state shall be entitled to recover the costs of investigation, expert witness fees, costs of the action, and reasonable attorney fees.

G. If a court determines that a person has violated the Master Settlement Agreement Complementary Act, the court shall order any profits, gain, gross receipts, or other benefit from the violation to be disgorged and paid to the State Treasurer for deposit in the Tobacco Settlement Endowment Trust Fund. Unless otherwise expressly provided, the remedies or penalties provided by the Master Settlement Agreement Complementary Act are cumulative to each other and to the remedies or penalties available under all other laws of this state.

SECTION 9. REPEALER Section 1, Chapter 333, O.S.L. 2002 (68 O.S. Supp. 2003, Section 360), is hereby repealed.

SECTION 10. It being immediately necessary for the preservation of the public peace, health and safety, an emergency is hereby declared to exist, by reason whereof this act shall take effect and be in full force from and after its passage and approval.

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